No. 03-1488

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In The

Supreme Court of the United States

ULYSSES TORY AND RUTH CRAFT,

Petitioners,

v.

JOHNNIE L. COCHRAN, JR.,

Respondent.

On Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division One

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This is not a case about restricting protected **speech**; it is a case about restricting specific individuals from engaging in further unlawful **conduct** that happens to consist primarily of (unprotected) speech, in order to prevent recurrence of extortion attempts those individuals have directed at Respondent, Johnnie L. Cochran, Jr. ("Cochran"). The injunction being challenged (hereinafter the "Injunction") is a properly tailored remedy designed to protect Cochran from the demonstrated intent of Petitioners, Ulysses Tory ("Tory") and Ruth Craft ("Craft") (collectively "Petitioners"), to make what have been irrevocably found to be false, malicious, and privacy-invading statements regarding Cochran's honesty and character, and the quality of his representation of Tory "for the purpose," not of expressing legitimate speech, but of trying to "induce Cochran to pay Tory various amounts of money to which Tory [is] not entitled." (JA 42, *see also*, JA 41-42.)

After a full trial on the merits, the Los Angeles Superior Court made the now-irrefutable finding that Tory defamed Cochran and invaded his privacy. He did this by orchestrating loud and intrusive demonstrations and picket lines outside Cochran's place of business and other places where Cochran appeared. Tory's purpose was not to express any legitimate ideas or opinions, but to "improperly coerce" Cochran to pay Tory "money in tribute for or premium for [Tory's] desisting from" making what the evidence showed were "false and defamatory and privacy-invading communications" intended by Tory to "prevent person(s) from entering Cochran's place of business . . . [by] creating a negatively charged and ominous environment." (JA 42-43.)

Tory specifically refused to cease his unjustified disruption of Cochran's business unless he was either "paid" or "prevented by a judgment or some other process of [the] court" from continuing to interfere with Cochran and Cochran's law practice. (JA 42-43.) Cochran did not pay because he "owe[d] no money whatsoever to Tory" (*Id.*), and he refused to accede to the extortion attempts. The **only** other way to stop Tory from infringing upon Cochran's rights was – by Tory's own admission – to order Tory to stop.

By ordering Tory to cease his unlawful conduct, the Injunction provides relief to Cochran and, at the same time, furthers governmental interests in, among other things: (i) protecting Cochran's property rights; and, (ii) discouraging others from trying to use their expression rights as weapons in schemes like Tory's. Despite the broad (but content-neutral) reach of the Injunction, under the unusual circumstances of this case, it could not be any more narrowly tailored while still serving the interests it is designed to further. Accordingly, the Injunction is not unconstitutional.

STATEMENT OF THE CASE

I. TORY'S "STATEMENT OF THE CASE" IGNORES THE FACTUAL FINDINGS MADE BY THE TRIAL COURT AND IS MISLEADING

In his Brief on the Merits (hereinafter, "MB"), Tory cites to his own testimony at trial regarding the events of the early 1980's that supposedly gave rise to Tory's right to

defame and otherwise damage Cochran until such time as Cochran paid Tory to stop.[1] After the fact, Tory is trying to make his conduct look like peaceful and honest communication of his legitimate opinion. The record is to the contrary, however. For example, Tory's public declaration that Cochran is a "crook, a liar and a thief" (JA 41), because he "offered to," but did not ever, "repay" Tory and Craft monies owed by another lawyer (MB 3), is contradicted by the binding determination made by the trial judge, that "Cochran owes no money whatsoever to Tory." (JA 39.) In fact, "Tory never paid Cochran any money at all for legal services or any other purpose." (JA 39.)[2]

Even more misleading is Tory's representation to this Court that he "picketed with a group of other people who were also dissatisfied with Cochran." (MB 3.) Purported authority for this statement is the testimony in the trial

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[1] As explained under heading "II.A.1." of the Argument Section, *infra*, the purpose of this proceeding is not to re-weigh evidence or reject the factual findings made in the court below. The trial court's factual conclusions, as set forth in the Statement of Decision (JA 36-50), should therefore be accepted as true for purposes of the constitutional analysis here at issue.

[2] Tory's self-serving testimony is also inconsistent with the now-incontrovertible determinations made by the trier of fact, Judge Ronald Sohigian, at trial and after all of the evidence was presented. For example, Tory argues that he and Craft "paid [attorney Earl] Evans ["Evans"] for his services under the impression that they were paying Evans as an agent of Cochran's law firm," and he claims that "Cochran offered to repay" Tory and Craft the money they paid to Evans. (MB at p. 3, citing RT 189:3-7, 253:1-19, 272:14-273:2.) Judge Sohigian found, however, that Tory and Craft knew and recognized that Evans and Cochran were not partners as evidenced by, among other things, the fact that all the checks for legal services rendered for Tory and/or Craft were made payable to Evans, not to Cochran.

transcript (hereinafter, "TT") at page 208, lines 22 through 26. That excerpt reads as follows:

> **"Q. Now, these fellow picketers, they weren't former clients of Mr. Cochran, were they? . . .**
>
> **A. One of them said that he was."**

The reality, then, is that Tory was not engaged in a legitimate public protest along with other dissatisfied former clients of Cochran. In fact, he admitted, "Yes, I bought the picketers lunch." (TT 212:7-9.) Tory even admitted to the "possibility" that he "g[o]t the picketers to join [him] in [his] picketing activity **because** [he] b[ought] them lunch." (TT 214-17 (emphasis added).)

Some of the very testimony cited by Tory to support his contention that his picketing had a legitimate purpose (MB 3) actually illustrates Tory's extortionist motives. At page 216, lines 6 through 12, the transcript reads:

> **"I'm picketing Mr. Cochran because he promised to give me the money that Mr. Evans owed. And the reason why Mr. Cochran promised me is because for me to stop picketing."**

Based on this and other testimony and evidence offered at trial, Judge Ronald Sohigian acceded to Cochran's request that an injunction be issued to protect Cochran from any future efforts by Tory to extract "blood money" from Cochran. Given Tory's predilection for misusing the public forum, the only effective way to provide Cochran with the assurance of peace that he deserved after prevailing at trial was to preclude Tory from discussing Cochran "[i]n any public forum." (JA 34.)

II. THE FINDINGS OF FACT CONTAINED WITHIN THE NOW-BINDING STATEMENT OF DECISION TELL A DIFFERENT STORY THAN THAT TOLD BY TORY

In the interest of fairness and accuracy, the factual background of this dispute – **as found by the trial court** in its Statement of Decision – should be recited:

> This litigation arises out of Tory's repeated unjustified demands for money from Cochran, which began in 1985 when Tory (who had retained Cochran as legal counsel in 1983) unreasonably demanded $10 million dollars. Tory and his putative wife, Craft, also demanded reimbursement of legal fees paid to Evans,[3] a "space-for-services" tenant in Cochran's law suite, even though they must have known that Cochran and Evans were not partners and hence Cochran was not liable for any debt Evans might have owed to Tory and/or Craft. (JA 38-39.)

Although he was a client of Cochran's, Tory never paid Cochran any money for legal services (or, for that matter, for anything else), and Cochran "owes no money whatsoever to Tory." In 1985, Cochran justifiably sought and obtained an order relieving him as counsel for Tory based on the conflict created by Tory's demands for $10 million and other statements made in Tory's 1985 letter to Cochran. Tory

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[3] Evans represented Craft in various family law matters. Evans' representation was not deficient, and the contention of Tory and Craft to the effect that Craft had prevailed in a child custody matter venued in federal court was not supported by the evidence. What actually happened is that Craft lost her case in the state court and then lost again in the federal courts. But after that, her former husband voluntarily turned the children over to her. As such, the fact that Craft ultimately obtained custody of her children is no reflection at all on the quality of legal representation rendered by Evans. (JA 40.)

and Craft made a complaint about Cochran to the State Bar, which took no action because the complaints described by Tory and Craft did not implicate "disciplinary matters." Rather, it appeared that Tory and Craft had a fee dispute with Cochran and/or Evans. No further legal action was taken by Tory and/or Craft against Cochran and/or Evans. (JA 39-40.)

Years after Tory's attorney-client relationship with Cochran ceased, Tory and Craft, along with their agents (acting within the scope of their agency), began regularly picketing Cochran's law office. "The picketing conduct was intentionally targeted at preventing person(s) from entering Cochran's place of business for legal services and creating a negatively charged and ominous environment." Tory and others carried placards containing derogatory and bizarre references to Cochran, such as "Johnnie is a crook, a liar and a thief," and "Johnnie L. Cochran, Esq. Your Piss Is Not Rain." Other "statements were made to the effect that Cochran owed a substantial amount of money to Tory" based on past breaches of contract, that Cochran acted "dishonestly or below the standard of care in prior legal representation of Tory" and that "Cochran [was] a bad character and/or a substandard practitioner of law."[4] After Cochran commenced litigation against Tory based on Tory's conduct, the disruptive activity of Tory and Craft escalated to include (among other things) "loud chanting of obscene statements." (JA 40-43.)

[4] Additional examples of the statements published by Tory as part of his picketing activity are listed at paragraph 1.a.(16) of the Statement of Decision, located at page 41 of the Joint Appendix, and are reprinted in footnote 12, *supra*.

The statements published by Tory as part of his efforts to disrupt Cochran's business "were false when they were made; were made maliciously and with reckless disregard for the truth; and were actually made for the purpose of inducing Cochran to pay Tory various amounts of money to which Tory was not entitled." Tory and Craft (as well as their agents) "were aware of the falsity of the statements when they were made." (JA 42-43.)

"Despite repeated requests, Tory . . . refused to cease his picketing efforts unless he was paid a monetary 'settlement' by Cochran." Tory admitted that, in the absence of such a payment, "unless prevented by a judgment or some other process of [the] court, he [would] continue to picket" and the trial court specifically found that he would so continue. (JA 43.)

Based on the forgoing factual determinations, Judge Ronald Sohigian concluded:

> **"This is not a matter of speech related issues: It is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting from that type of activity."** (JA 43.)

Judge Sohigian also found that Cochran would suffer irreparable harm as a result of Tory's coercive and unprotected conduct, and that a multiplicity of actions would be engendered, without an injunction. (JA 43-45.)

SUMMARY OF ARGUMENT

The Injunction issued by the Los Angeles Superior Court is constitutional. It is the end product of a lawsuit wherein Cochran successfully established, not only that he had been defamed and had his privacy invaded by Tory, but also that Tory had engaged in blatant and repeated acts of what clearly constitutes both criminal and civil attempted extortion – speech-related conduct that is **not** protected by the First Amendment.

Further, Tory admitted that, absent a court order prohibiting him from doing so, Tory would continue his disruptive, offensive, tortious and criminal use of the public forum as leverage for extortion efforts. In so doing, Tory would necessarily infringe upon the rights of Cochran, Cochran's clients and potential clients and the public in general.

The government has a significant interest in preventing Tory from engaging in unprotected speech-related conduct to the detriment of the public. The judicial branch has therefore rightfully enjoined Tory from carrying out his stated intention of renewing his disruptive campaign to extract payment from Cochran "in tribute for" Tory ceasing his picketing and ending his campaign to harass and annoy the public in general and Cochran in particular, thereby disrupting Cochran's business and interfering with his ability to practice law.

Tory has demonstrated that he will not hesitate to misuse the public forum by taking advantage of his right to freely express himself in the hopes of achieving personal gain. Under these circumstances, the least restrictive means of curtailing Tory's insistence on treating his fellow citizens as pawns in his extortion scheme to extract money

from Cochran is to deprive him of the right to discuss Cochran in the public forum.

The Injunction does not distinguish between "good" and "bad" expression about Cochran; any public communication on the subject of Cochran is prohibited. Because it is content-neutral and specifically targeted at remedying the particular wrongful conduct in which Tory has engaged, and preventing a recurrence thereof, the Injunction is not an unconstitutional prior restraint. Moreover, because it stifles only unprotected speech of little or no social value, and prevents Tory from unjustifiably infringing the rights of Cochran and others, this Court should allow the Injunction to stand by following cases such as *Madsen v. Women's Health Center, Inc.* 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network Of Western New York*, 519 U.S. 357 (1997) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), where the constitutionality of similar and analogous orders was recognized.

ARGUMENT

I. AT ISSUE IS WHETHER IT IS CONSTITUTIONAL TO PROHIBIT TORY FROM EXERCISING HIS SPEECH RIGHTS IN A "PUBLIC FORUM" IN ORDER TO PRECLUDE FURTHER EXTORTION EFFORTS

The question purportedly presented by Petitioners is whether a permanent injunction "preventing all future speech" about a public figure violates the First Amendment when it is issued as a "remedy in a defamation action." (MB i.) This is not the question that is before the Court, however, for two reasons:

First, the Injunction does not extend to "all future speech" by Tory about Cochran; Petitioners are exaggerating when they say that "Tory and Craft cannot say anything about Cochran" while the current Injunction is in place. (MB 8.) Paragraph 2 of the Injunction prohibits Tory from picketing and making written or oral statements about Cochran "**[i]n any public forum**." (JA 34 (emphasis added).)[5] A "public forum" is not the same as "anywhere."[6] Thus, although it is broad, the Injunction is not as broad as Tory describes it.

Second, this is not just a "defamation action." Cochran successfully prosecuted, not only four defamation claims (for libel, libel *per se*, slander and slander *per se*) against Tory, but also a cause of action for invasion of privacy. More importantly, evidence was presented at trial from which the fact-finder conclusively determined that Tory's communications about Cochran "were actually made for the purpose of inducing Cochran to pay Tory various

[5] The remaining provisions (which are not discussed in Tory's Brief on the Merits and hence are not at issue here) restrict or prohibit conduct described as "[s]tanding, assembling or approaching" Cochran and "[c]ontacting, harassing, threatening, stalking, disturbing the peace of, keeping under surveillance or blocking the movements of Cochran."

[6] Under California law, a public forum exists only in a location that: (i) is "open to the public"; and (ii) is a place where "information is freely exchanged." (*Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 469, 475 (2000). Under federal law: (i) "traditional public forums" are places such as streets and parks that, by long tradition, have been devoted to assembly and debate; and (ii) "designated public forums" (also known as "limited public forums") are those created by government designation. (16A Am.Jr.2d *Constitutional Law* § 519, citing to *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 360 (1996).)

amounts of money to which Tory was not entitled." (JA 42.[7]) As such, Tory's conduct also necessarily constituted "attempted extortion," which is both a tort and a crime.[8]

Based on Tory's "Question Presented," it is clear that Tory is not challenging the Superior Court's findings that Tory defamed Cochran, invaded Cochran's privacy, and engaged in the acts that constituted attempted extortion. It is equally clear that the abstract question of "[w]hether a permanent injunction . . . preventing **all future speech** about Cochran" can constitutionally issue, cannot be answered based on the record before this Court, because the Injunction does not prohibit "all future speech about" Cochran.

Given the actual language of the Injunction, the question that can be answered is:

> **"Whether, *under the facts of this case*, the *specific Injunction issued by the Los Angeles***

[7] Paragraph (27) of the Statement of Decision reflects the following finding, made by Judge Sohigian: "This is not a matter of speech related issues: it is simply the use of false and defamatory and privacy-invading communications to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting from that type of activity." (JA 43.)

[8] Section 518 of the California *Penal Code* defines "extortion" as "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear. . . ." Section 519 provides that "fear," as used in Section 518, "may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or, [¶] 3. To expose, or to impute to him or them any deformity, disgrace or crime . . . " Section 524 punishes "[e]very person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort money or other property from another. . . ."

***Superior Court* – which precludes Tory and his agents from picketing and making oral and written statements about Cochran *only* "*in the public forum*" – violates the First Amendment."**

The answer to this question is "no." Cochran's lawsuit against Tory was tried to conclusion. Based on the evidence offered at trial, the trier of fact made findings supporting Cochran's contentions that: (i) the conduct which Tory is enjoined from engaging in is not the type of expression that is protected by the First Amendment; and, (ii) the Injunction is drawn as narrowly as possible in light of its purpose.

II. THE INJUNCTION ENJOINS TORY FROM RENEWING HIS TORTIOUS AND ILLEGAL EXTORTION ATTEMPTS AND DOES NOT AFFECT ANY INFORMATION THAT IS OF PUBLIC CONCERN

A. The Evidence Supporting The Findings Made By The Fact-Finder Should Not Be Re-Weighed By This Court

After a full trial on the merits, the Los Angeles Superior Court issued a "Statement of Decision" pursuant to Section 632 of the California *Code of Civil Procedure*[9] and Rule 232 of the California *Rules of Court*.[10] Therein, the

[9] Section 632 provides, in pertinent part, "[t]he court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at trial."

[10] Rule 232 provides, in pertinent part, "[i]f a statement of decision is requested, the court shall, within 15 days after the expiration of the time for proposals as to the content of the statement of decision,

(Continued on following page)

Honorable Ronald Sohigian, sitting as the trier of fact, made 32 specific findings supporting the issuance of the Injunction. As discussed above, Tory largely ignores the Statement of Decision, and in his "Statement of the Case," cites instead to his own trial testimony as he describes his version of the underlying events. In so doing, Tory is implicitly and improperly asking this Court to re-examine and reject the findings made by the trier of fact.

It is not the role of the United States Supreme Court to "exert its jurisdiction merely to review a decision of a state court upon a question of fact." (Stern, Grossman, et al., *Supreme Court Practice,* ¶3.27 [8th ed. 2002].) "[O]nce a case is otherwise before it, the [Supreme] Court generally will not re-examine the state court's findings and conclusions of fact." (*Id.*) To the contrary, "in the absence of exceptional circumstances," the nation's highest court "defer[s] to the state-court factual findings." (*Hernandez v. New York*, 500 U.S. 352, 366 (1991); *see also, Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997) [injunction issued based on "uncontradicted evidence of harmful intent" introduced at the trial court level]; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 709 (1931) [Supreme Court "is not concerned with mere errors of the trial court"].)

Tory's efforts to transform the constitutional question raised herein into a challenge to the trial court's factual findings should not succeed. This Court is being called upon to decide whether the Injunction is constitutional **under the facts found by the trial court to exist**, not

prepare and mail a proposed statement of decision and a proposed judgment to all parties who appeared at trial. . . ."

to re-weigh the evidence presented at trial or to assess the constitutionality of an injunction issued under facts **different** from those set forth in the Statement of Decision.

B. The Fact-Finder Determined That Tory Abused And, Absent The Injunction, Will Continue To Abuse, His Right To Speak Publicly About Cochran By Using His Expression For Tortious And Illegal Purposes

1. The Speech Here At Issue Was Defamatory

Prior to the issuance of the Injunction, Tory publicly made:

> **"[S]tatements to the effect that Cochran owed a substantial amount of money to Tory; that Cochran owed debts to Tory based on breaches of past oral and written agreement[s;] that Cochran acted dishonestly or below the standard of care in prior legal representation of Tory; and that Cochran is a bad character and/or a substandard practitioner of the law."** (JA 41-42.)

At trial, it was determined that: (i) these statements were "untruthful, misleading and malicious" (JA 41); (ii) the statements Tory published "were false when they were made" and "were made maliciously and with reckless disregard for the truth"; and, (iii) "Tory . . . [was] aware of the falsity of the statements when they were made." (JA 42.)

The foregoing findings establish that Tory defamed Cochran, and the trial court so ruled. That ruling is not being challenged by Tory.

2. Tory's Conduct Was Not Merely Defamatory; It Was Also Invasive Of Cochran's Privacy And Designed To Extort Money From Cochran

Tory characterizes the "Question Presented" by his Petition, in part, as whether the Injunction is a proper "remedy in a defamation action." (MB i.) At trial, however, Cochran also successfully proved "invasion of privacy." More importantly, Cochran obtained a ruling that Tory's actions were "intentionally targeted at preventing person(s) from entering Cochran's place of business for legal services and creating a negatively charged and ominous environment" *until such time as "Tory . . . was paid a monetary 'settlement' by Cochran."* (JA 42 (emphasis added).) Tory not only made tortious statements, he made them "for the purpose of inducing Cochran to pay Tory various amounts of money to which Tory was not entitled." (JA 42.) Moreover, Tory has admitted that, unless enjoined, he will resume this wrongful conduct. (JA 43.)

Accordingly, the trial court concluded that the conduct about which Cochran complained was much more than just defamation; it was:

> **"[T]he use of false and defamatory and privacy-invading communications to . . . attempt to . . . coerce payment of money in tribute for or premium for desisting from [continuing to engage in] that activity."** (JA 43.)

Under California law, the foregoing facts establish "attempted extortion" on the part of Tory, which is both a crime and a tort. (California *Penal Code* §§ 518, 519; *see, e.g., Flatley v. Mauro*, 121 Cal.App.4th 1523 (2004) [analyzing a claim for "civil extortion" by reference to citing Sections 518 and 519 of the California *Penal Code*].)[11]

C. Tory's Extortionist Comments Were Not Part Of Any Legitimate Public Debate Or Commentary

Tory characterizes the speech here at issue as discussion "about the practice of law and the operation of the legal system." (MB 12-13.) He claims that he "picketed because he believed that he had not been treated fairly by Cochran, that he had not been represented adequately by Cochran, and that he had been deceived by Cochran into thinking that he would be refunded money" (MB 3). He argues that he has a right to "inform the press and the public of [his] experiences, including how [he was] treated by" Cochran. (MB 13.) If these assertions were supported by the record, Tory might have a point. However, they are not.

First, there is no restriction whatsoever on Tory's right to speak about lawyers or the legal system generally. The Injunction governs only "statements about Cochran and/or Cochran's law firm." (JA 34.) It does not impact commentary about other lawyers or this country's judicial system. Thus, it is incorrect to imply (as Tory does) that Cochran is asking this Court to condone stifling public criticism about issues of general interest; Cochran is not.

[11] *See also* fn. 8, *supra*.

Second (and most important), Tory is disingenuous when he argues that he was picketing for a legitimate purpose (*i.e.*, because he "believed he had not been treated fairly" or "represented adequately" and because he honestly thought Cochran had "deceived" him). The trial court, acting as a finder of fact, rejected these contentions and determined that Tory's purpose in demonstrating was "to coerce or attempt to improperly coerce payment of money in tribute for or premium for desisting" the intrusive and damaging activity. (JA 43.) Thus, the question at bar is whether it is unconstitutional to restrict extortionist conduct, not whether Tory may be restrained from expressing honest opinions.

Third, the Injunction did not issue to stop Tory from communicating information regarding his experiences with Cochran. It issued because:

> **"The picketing conduct of Tory and his agents was intentionally targeted at preventing person(s) from entering Cochran's place of business for legal services and creating a negatively charged and ominous environment."** (JA 41-42.)

Moreover, the placards carried by Tory and his recruits did not contain factual information "about the practice of law and the operation of the legal system," nor do they relate to "how [Tory] was treated" by Cochran. (MB 13.) Rather, they contained distasteful and inflammatory slogans such as "Attorney Johnnie L. Cochran, Esq., Your Piss is Not Rain," and "Cochran Screwed You Guys

Too." (JA 41.)[12] These types of statements, made for the purpose of disrupting Cochran's business (JA 42, 43), and with the specific intent to extort money from Cochran (JA 43), were properly enjoined.

III. THERE IS NO FIRST AMENDMENT RIGHT TO USE FALSE, DEROGATORY, BIZARRE AND OBSCENE SPEECH AS A MEANS TO ATTEMPT TO EXTORT MONEY

Petitioners do not deny that Cochran satisfied the requirements for issuance of an injunction pursuant to California *Code of Civil Procedure* Section 526.[13] Instead they argue that, regardless of whether the statutory prerequisites were met, the Injunction should not have issued because it unconstitutionally infringed Tory's First Amendment guarantee of freedom of speech. It is not,

[12] The Injunction identifies the following statements, which were offered into evidence at trial: (1) "Johnnie is a crook, a liar and a thief. Can a lawyer go to heaven? Luke 11:46"; (2) Hey Johnnie How Much Did They Pay $$ you to F_ _ k Me?; (3) "You've been a BAD, BAD boy, Johnnie Cochran"; (4) "Attorney COCHRAN we have no use for Illegal Abuse"; (5) I Know How It Feels to be Terrorized; (6) Absolute Discrimination; (7) "Attorney Cochran, Don't We Deserve at Least the Same Justice as O.J.?"; (8) Unless You Have O.J.'s Millions You'll be Screwed if You Use J. L. Cochran, Esq.; (9) Johnnie L. Cochran, Esq., Your Piss is Not Rain; (10) "Attn: Attorney Johnnie L. Cochran, Jr., Flaunting and Flossing It's the People He's Costing"; (11) Attorney Johnnie, It's Past Time; (12) Johnnie Cochran I Know What You, the County and the City did [sic] my case; and, (13) "Don't Laugh, Cochran Screwed You Guys Too." (JA 53-54.)

[13] Section 526 provides, in pertinent part, "[a]n injunction may be granted . . . [w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually."

however, unconstitutional to judicially proscribe a citizen from engaging in **unprotected** speech activities, which is exactly what Tory was enjoined from doing.

Speech – particularly defamatory and otherwise tortious speech – used as part of an extortion effort is not protected by the First Amendment. As Justice Stevens, concurring, wrote in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992):

> **"Although the First Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, *threaten [or] extort.*'"** (Emphasis added.) (*R.A.V.* at 420, quoting Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts," 34 Vand. L.Rev. 265, 270 (1981).)

The Court of Appeals for the Fifth Circuit has stated this principle even more clearly:

> **"[E]xtortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all."** (*U.S. v. Quinn*, 514 F.2d 1250, 1268 (1975).).

The Fourth Circuit expressed similar sentiments in *United States v. Marchetti*, 466 F.2d 1309, 1314 (4th Cir. 1972), where it was held that "[t]hreats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal." Finally, in *Flatley*, *supra*, 121 Cal.App.4th at 485-86, the California Court of Appeal noted that neither the federal nor the state courts recognize expression used for the purpose of

attempted extortion as "a constitutionally protected form of speech."

The Injunction prohibited speech-related activity only because speech (both written and oral) was the medium through which Tory accomplished his attempted extortion (along with other tortious and/or criminal conduct). As illustrated by the above authorities, however, speech used in an extortion attempt is not protected. The Injunction, therefore, is not constitutionally infirm to the extent that it necessarily enjoins speech and other expressive activity as part of its order requiring Petitioners to cease and desist their wrongful extortion efforts.[14]

IV. AN INJUNCTION IS NOT NECESSARILY "PRIOR RESTRAINT" OR OTHERWISE IMPROPER JUST BECAUSE IT AFFECTS SPEECH

A. Petitioners' Analysis Of The Meaning And Effect Of "Prior Restraint" Is Erroneous

1. The Injunction Does Not Constitute Prior Restraint

Cochran does not dispute the importance of protecting the safeguards guaranteed by the First Amendment. He agrees that "debate about important issues of public concern" (MB 12) should not be stifled. He even acknowledges the "heavy presumption against [the] constitutionality" of a prior restraint (MB 18, citing *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980)), and the

[14] The necessity for the broad scope of the prohibition is discussed under heading V, below.

general principle that prior restraint is a disfavored remedy. (*See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).) However, none of this matters because, as explained below, the Injunction is not a "prior restraint."

a. Not All Permanent Injunctions Affecting Speech Act As Previous Restraint On Expression Because Not All Expression Is Unconditionally Protected By The First Amendment

Petitioners are wrong when they state that "permanent injunctions . . . that actually forbid speech activities" are necessarily presumptively unconstitutional as prior restraints. (MB 14, 18.) In fact, the opposite is true:

> **"Not all injunctions that may incidentally affect expression are 'prior restraints.'"** (*Madsen, supra*, 512 U.S. at 763, fn. 2.)

As the Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973) held:

> **"It has never been held that all injunctions [affecting expression] are impermissible."**

"Prior restraint" exists only where the government is given discretion to regulate or prohibit **protected** speech (*Ward v. Rock Against Racism*, 491 U.S. 781, 812 (1989) (Justice Marshall, dissenting)); it has no application to **unprotected** expression, such as obscenity. (*See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).) Accordingly, since speech and other expressive

conduct used for the purpose of attempting to extort money is not protected by the First Amendment,[18] it is not prior restraint to enjoin extortion. (*See, e.g., NOW v. Scheidler*, 1999 WL 57010 (N.D. Ill. July 28, 1999).)

Likewise, expression incident to defamation is often outside "the area of constitutionally protected speech." (*Beauharnais v. Illinois*, 343 U.S. 259, 266 (1952); *New York Times v. Sullivan*, 376 U.S. 254 (1964).) For example, there is no protection for a false and otherwise defamatory statement "relating to" a public figure's "official conduct" that is made "with knowledge that it was false or with reckless disregard of whether it was false or not." (*New York Times* at 279-280.) Similarly, most libelous and slanderous communications about private citizens or about something other than the "official conduct" of a public figure, remain unprotected. (*See, e.g., Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 339-340 (1974).)

Finally, the First Amendment does not protect either a proven tortious invasion of privacy or the speech attendant thereto (unless the privacy invading information was obtained by a media defendant from the official public record). (*See, e.g., Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 494-495 (1975).)

b. Enjoining Expression That Has Been Adjudicated As Unprotected Is Not Prior Restraint

In cases such as *Paris Adult Theatre I, supra*, and *Pittsburgh Press, supra*, injunctions restricting expression

[18] *See* discussion under heading III above.

that was determined, after trial, to be unprotected, withstood constitutional scrutiny. In *Paris Adult Theatre*, for example, the constitutionality of an injunction prohibiting the exhibition of a film was affirmed. Although expression was obviously affected by the order, there was no "prior restraint" because the injunction issued "after a full adversary proceeding and a final judicial determination . . . that the [film was] constitutionally unprotected" based on its obscene content. (*Paris Adult Theatre* at 55.)

In *Pittsburgh Press, supra*, an order prospectively forbidding a newspaper to publish certain types of information (specifically, whether perspective employers preferred male or female applicants) was, like the injunction in *Paris Adult Theatre*, found not to be a "prior restraint." A fact-finder had determined that the practice did not comply with state law, and the Court was asked to enjoin future conduct based on past statutory violations. It was able to constitutionally do so because a "continuing course of repetitive conduct" was being enjoined, which meant that the court was not "asked to speculate as to the effect of" the future conduct. It could reasonably assume that the violative conduct that had occurred in the past would continue into the future and would have the same consequences in the future as it had had in the past.

The foregoing authorities conclusively refute Petitioners' generalized conclusion that any restriction imposed by the government on future speech necessarily constitutes "prior restraint." In fact, there is no proscription against injunctions limiting, and even prohibiting, conduct that is unlawful and/or speech that is unprotected. (*See, e.g., Madsen, supra*, at 764, fn. 2, 766, 798 [injunctions imposed based on prior unlawful conduct are not prior restraint];

Freedman v. Maryland, 380 U.S. 51, 58 (1965) [unprotected films may be barred].)

In this case, there has been a "full adversary proceeding and final judicial determination" that the defamatory privacy invading and extortionate conduct prohibited by the Injunction from recurring, is constitutionally unprotected. The Injunction, therefore, is **not** a prior restraint, notwithstanding Petitioners' insistence on referring to it as such. (*Cf.*, *Vance, supra* [prior restraint existed where a statute allowed a court to enjoin the showing of motion pictures "that [had] not been finally adjudicated to be obscene"].) Petitioners' suggestion that the Injunction must be dissolved, simply because it prospectively restricts certain speech related activities, must therefore be rejected out of hand.

c. Only Injunctions Prohibiting Expression That Could Be Found To Be Protected May Constitute Prior Restraints

Petitioners cite cases for the principle that injunctions may, even after trial, be held to be prior restraints by a higher court. These authorities do not assist them in establishing that the Injunction here at issue – entered after unlawful conduct and unprotected speech **was found** to have occurred – is improper. The four-part test articulated in the "seminal case concerning prior restraints" (MB 15) of *Near, supra*, for example, when applied to the facts of this case, reveals that the Injunction here is practically the antithesis of prior restraint.

In *Near*, a challenge was brought to an injunction issued pursuant to a statute that provided for the "abatement as a

public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical'" unless the "truth" of the objectionable material could be shown as well as publication "with good motives and for justifiable ends." (*Id.* at 702.) It was determined that the statute infringed the guaranteed "liberty of the press" by "impos[ing] an unconstitutional prior restraint upon publication" (*Id.* at 713, 723) because: (i) it "was not aimed at the redress of individual or private wrongs" (*Id.* at 709); (ii) it was designed to inhibit publication by newspapers and periodicals of information in which the public has a legitimate interest, such as "charges against public officers of corruption, malfeasance in office, or serious neglect of duty" (*Id.* at 710); (iii) "[t]he object of the statute [was] not punishment . . . but suppression of the offending newspaper or periodical" (*Id.* at 711); and, (iv) the description "malicious, scandalous or defamatory" was not adequate to put citizens on notice of the type of expression that could trigger the statute. Therefore, in order to enforce the law, the court necessarily had to engage in "effective censorship." (*Id.* at 712.)

Although the *Near* test was not explicitly applied in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the *Keefe* court cited *Near* as support for its finding that an "injunction against peaceful distribution of informational literature" constituted "an impermissible restraint on First Amendment rights" because it "operate[d] **not to redress alleged private wrongs**, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." (*Keefe* at 418-419.) (Emphasis added.) Accordingly, the *Keefe* court established that the most critical element of the four-pronged *Near* test is whether

the challenged injunction was designed to redress "individual or private wrongs."

d. The Injunction Is A Proper Remedy In This Case Because It Governs Conduct That The Trial Court Has Already Found To Be Unlawful

According to Petitioners, "*Near*, *Keefe* and *Vance* establish that even though a permanent injunction follows trial, it is still unquestionably a prior restraint on speech." (MB 17.) From this already faulty premise, Petitioners draw yet another inaccurate conclusion, *to wit*, that the Court of Appeal in this case formulated the rule that "a permanent injunction is not a prior restraint if it follows trial." (MB 17, citing JA 56-57.) What the Court of Appeal **actually** said was that "an injunction does not constitute an impermissible prior restraint" **if "there has been a final adjudication on the merits and *the speech at issue is determined to be unprotected.*"** (JA 57 (emphasis added).)

Neither Cochran nor the Court of Appeal contends that **every** permanent injunction that issues after **every** trial is constitutional, nor does Cochran argue that the mere fact that he has fully litigated his claims against Tory **automatically** justifies the Injunction. The constitutionality of the Injunction does not derive from the fact that there **was a trial**; it derives from the nature of the findings that were made **at the trial**.[16]

[16] The fact that prior restraint was found to exist after trial (or hearing) in *Near*, *Keefe* and *Vance*, is of little or no relevance to the First Amendment analysis. In each of those cases, the restrictions would

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Specifically, it has been fully and finally determined that the Injunction passes constitutional muster. The trial court's findings confirm that: (i) the speech that has been affected by the Injunction here at issue is not protected by the First Amendment; (ii) the Injunction issued, not to suppress legitimate debate, but as a remedy for legally cognizable wrongs Tory committed against Cochran; and, (iii) the wrongs committed by Tory were part of a continuing course of repetitive wrongful conduct that would have continued, but for the Injunction (and would recur if the Injunction were lifted). It is these three factual findings that were made at trial – not the trial itself – that render the Injunction immune to Petitioners' challenges.

i. The Expression Affected By The Injunction Is Not Constitutionally Protected

The constitutional concern of the prior restraint doctrine is that a "communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment" has been made. (*Pittsburgh Press*, *supra*, at 390 (emphasis added).) Conversely, then, if "an adequate determination" has been made that a statute, ordinance, judicial decree or other act of government suppresses only communication that is "unprotected by the First Amendment," then there is no viable "prior restraint" challenge.

have been even more obviously unconstitutional if they had been imposed before trial. There, the facts found at trial established the existence of prior restraint. Here, however, the trial developed facts that compel the opposite conclusion.

Here, the Superior Court found that Tory committed the torts of libel, slander and invasion of privacy. (JA 38-53.) As explained above, Tory enjoys no First Amendment protection for that conduct; once the elements of those torts are found to exist, the expression is **unprotected** as a matter of law. Further, under no theory is there constitutional protection for extortionate conduct. Thus, the fact that the Injunction prohibits future conduct in the form of speech does not render the speech protected. (*See, e.g.*, *Roth v. United States* (*Alberts v. State of California*), 354 U.S. 476, 483 (1957) ["Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it"].)

ii. The Injunction Is "Subsequent Punishment," Not "Prior Restraint"

This Court has drawn a distinction between disfavored "prior restraint" and perfectly acceptable "subsequent punishment" imposed "after a full ... trial." (*Alexander v. U.S.*, 509 U.S. 544, 549-550, 553 (1993) [forfeiture order, even though it incidentally affected expression was not a prior restraint on speech, but a punishment for past criminal conduct]; *see also*, *Near* at 714-715 [statute was held unconstitutional, in part because it did not deal with punishment][17].) The rules governing prior restraint

[17] The statute in *Near* was "not aimed at the redress of individual or private wrongs" and in fact did not even "deal with punishments." (*Id.* at 709, 715.) Instead: **"It was aimed at the distribution of scandalous matter as 'detrimental to public morals and to the general welfare,' tending 'to disturb the peace of the community' and '... assaults and the commission of crime.... The law is not for the protection of the person attacked nor to punish**

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thus have "no application where ... an injunction against a private person operates 'to redress alleged private wrongs,' not to suppress a legitimate publication." (JA 56.)

The Court of Appeal correctly determined that the Injunction falls into the latter category (JA 56). It is directed only at Tory and his agents, and the facts found by the trial court establish that the Injunction is designed to protect Cochran from suffering further extortion attempts. It is also clear that Cochran is not attempting to keep the public from learning anything of value; the lies and obscenities Tory will spread if not enjoined from doing so are completely devoid of any redeeming value.[18] (*Cf.*, *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) [Court declined to enjoin publication of a classified study about Vietnam because information contained therein was deemed to be "of vital importance to the people of this country," and the media defendants who wished to disseminate the study had a "duty" to expose the "workings of government" and to keep the public informed[19]].)

the wrongdoing. It is for the protection of the public welfare.'" (*Id.* at 709.).) The same could hardly be said of Tory.

[18] *See* footnote 12, *supra*, for the type of statements being made by Tory.

[19] Justice Black wrote: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.... The press was protected so that it could bare the secrets of government and inform the people.... In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly.... [T]he newspapers nobly did precisely that which the Founders hoped and trusted they would do." (*New York Times, supra*, at 717.) The same could hardly be said of Tory.

iii. The Continuing Course Of Wrongful Conduct Established At Trial May Be Enjoined

Tory cites the case of *Vance v. Universal Amusement Co.*, *supra*, for the principle that "prohibiting future conduct after a finding of undesirable present conduct" is a "mistake." (MB 16.) *Vance* does not suggest, however, that future conduct can never be prohibited based on past indiscretions. It held simply that "the heavy hand of the public nuisance statute" – particularly when "coupled with the Texas Rules of Civil Procedure governing injunctions" – was not sufficiently "sensitive" to effectively distinguish between protected and unprotected speech for purposes of determining what could and could not be enjoined. (*Vance* at 311, fn. 2.)

Thus, *Vance* does not contradict the accepted rule that future speech may be restricted without running afoul of the general prohibition against prior restraint, so long as evidence is presented at an adversary hearing which demonstrates that the speech to be restricted in the future is part of a "continuing course of repetitive conduct" consisting of communications that have been shown to be "unprotected." (*Pittsburgh Press* at 379; *see also*, *Auburn Policy Union v. Carpenter*, 8 F.3d 886 (1st Cir. 1993); *Retail Credit Corp. v. Russell*, 234 Ga. 765 (1975); *Aguilar v. Avis Rent A Car Systems, Inc.*, 980 P.2d 846, 21 Cal.4th 121 (1999).) This rule evolved because where there is ongoing wrongdoing, a court is not "required to speculate as to the effect of publication" of the future speech, and therefore may constitutionally enjoin or limit it. (*Id.*)

Here, it has been conclusively established, not only that Tory's picketing and other conduct was unprotected as extortion, libel and/or other tortious conduct, but also that:

> **"Despite repeated requests, Tory . . . refused to cease his picketing efforts unless he was paid a monetary 'settlement' by Cochran."** (JA 43.)

Tory also admitted that, in the absence of such a payment, "unless prevented by a judgment or some other process of [the] court, he [would] continue to picket" and the trial court specifically found that he would so continue. (JA 43.)

It is therefore clear that "a continuing course of wrongful conduct" was conclusively established by Cochran, and the trial court was correct in enjoining Tory from engaging in more such acts in the future.

2. The Injunction Would Not Necessarily Be Unconstitutional Even If It Did Operate As A Prior Restraint

As explained above, the Injunction here at issue quite clearly does **not** constitute a prior restraint. Hence the rules that apply to prior restraints and the higher standard of scrutiny that must be employed in the evaluation thereof have no place in this proceeding. It is worth noting, however, that even assuming, *arguendo*, that this Court deemed the Injunction to be a prior restraint, its constitutionality could still be upheld because "[it] has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid." (*Times Film Corporation v. Chicago*, 365 U.S. 43, 47 (1961) [finding that a "challenged section of an ordinance" that "[a]dmittedly . . . impose[d] prior restraint" by "requiring the submission of films prior to their public exhibition," was not void on its face]; *see also*, *Near*,

supra, at 716 ["protection even as to previous restraint is not absolutely unlimited"].)

The truth of these comments is borne out by the decision in *Kingsley Books v. Brown*, 354 U.S. 436 (1957). There, a statute made injunctive relief available as a civil remedy against the sale or distribution of obscene material. The law was found to constitute prior restraint because the threat of such civil prosecution "provide[d] an effective deterrent against distribution prior to [an] adjudication" of obscene content in materials for sale. (*Id.* at 443.) The Court did not end its analysis there, however, commenting:

> **"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test."** (*Id.*)

Accordingly, the Court had a "duty" to engage in a "particularized analysis," and it did so. (*Id.* at 441-442.) Because the civil remedy at issue in *Kingsley* was less restrictive of freedom of expression than a parallel criminal statute that had been upheld in *Roth*, *supra*,[20] it was determined to be constitutional.

Hence, even if the Injunction here at issue were a "prior restraint," it would not necessarily be unconstitutional. It "avoids constitutional infirmity . . . if it takes place under procedural safeguards designed to obviate the

[20] Significantly, though the defendant in the *Alberts v. California* part of the *Roth* case was "completely separated from society for two months" and "seriously restrained from trafficking in all obscene publications for a considerable period of time" (two years), the criminal statute at issue therein was found to be constitutional.

dangers of a censorship system." (*Freedman*, *supra*, at 58.)[21]

3. The Absence Of Authority Specifically Condoning Prior Restraint As A Remedy In A Defamation Action Does Not Compel Reversal Of The Court Of Appeal

Petitioners' argument that "this Court never has upheld a prior restraint as a permissible remedy in a defamation action" (MB 19) is somewhat misleading, and largely irrelevant. It is irrelevant because Cochran is not arguing that he is entitled to impose prior restraint on Petitioners by virtue of his defamation claim; he is arguing that the Injunction – **which is not a prior restraint** – is constitutional because it issued to enjoin what the Court found to be extortionate conduct.

Moreover, even if the Injunction is characterized as a prior restraint, the absence of precedent wherein prior restraint was ordered as a remedy for defamation is not significant unless there is precedent wherein a defamation plaintiff **sought**, but was denied, that remedy under facts analogous to those at bar.

[21] Those procedural safeguards in the context of film exhibition require the following: "First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. . . . [Third], the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." (*Id.*)

Finally, the possibility that a constitutional prior restraint could be a remedy for defamation has specifically been considered (albeit in the abstract). In support of its holding that prior restraint is not necessarily unconstitutional, the *Times Film* court noted that a unanimous Supreme Court, in *Chaplinsky v. State of New Hampshire*, 315 U.S. 368 (1942), "held that there were 'certain well-defined and narrowly limited classes of speech'" – including "libelous . . . words" – "the prevention and punishment of which have never been thought to raise any Constitutional problem" because "by their very utterance" they "inflict injury." (*Times Film*, *supra*, at 48, citing *Chaplinsky* at 571-572.) If libel is thus exempt from First Amendment constraints, then there is no basis for refusing to enjoin it.

B. Cochran's Remedy Is Not Limited To Damages

1. Current Law Regarding The Tortious Violation Of Privacy And Extortion Permits An Award Of Injunctive Relief Under The Facts At Bar

Citing primarily inapposite cases that are close to a century or more old, involve media defendants, and interpret state constitutions, Petitioners argue that "prior restraints" are not a permissible remedy in this case. In so doing, Petitioners again fail to acknowledge that the Injunction is not (or at least is not necessarily) a prior restraint.[22]

[22] *See* discussion under heading IV.A.1., *supra*.

Petitioners also conveniently ignore the fact that Cochran successfully sued Tory for invasion of privacy – a tort for which the remedy of an injunction has frequently been sought and granted in federal courts. (*See, e.g., Doe v. McMillan*, 412 U.S. 306 (1972) [addressing the question of congressional immunity in the context of a lawsuit seeking, among other things, injunctive relief for alleged invasions of privacy that had occurred or would occur by virtue of dissemination of a governmental investigation into the public schools in the District of Columbia]; *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp.2d 823 (C.D. Cal., 1998) [preliminary injunction issued prohibiting dissemination of a video tape showing the plaintiff engaged in sexual activity].)

Finally, and most importantly, there is no discussion in Petitioners' Brief on the Merits, of the pervasive and ongoing extortion attempts recognized by the trial court, which create another independent entitlement to an injunction. (*See, e.g., United States v. Sasso*, 215 F.3d 283, 285 (2d Cir. 2000) [complaint filed seeking to enjoin extortion by organized crime].)

2. Petitioners Overstate The Modern Application Of The Adage That "Equity Will Not Enjoin A Libel"

While Cochran does not dispute that in the eighteenth, nineteenth and early twentieth centuries, the "traditional rule . . . that equity has no jurisdiction to enjoin a libel" was often applied, the proscription is not as broad as Petitioners suggest. In the labor context, for example, there are a number of United States Supreme Court decisions where it has not been strictly applied. In *American Steel Foundries v. Tricity Central Trades Council*,

257 U.S. 184, 206-207 (1921), for example, the Supreme Court opined that strikers and sympathizers involved in a labor dispute should be "enjoined from congregating or loitering at the plant [that was the target of a strike] or in the neighboring streets," and further that they should be "admoni[shed] that their communication . . . shall not be abusive, libelous or threatening."

A request that libel be enjoined was similarly entertained in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983). There, a restaurant filed a lawsuit seeking "a temporary restraining order and preliminary and permanent injunctive relief" against disgruntled picketing employees for, among other things, libel. (*Id.* at 734.) Although the application for a preliminary injunction was denied, a temporary restraining order issued (*Id.*)

Finally, the Court in *dicta* in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), responded to a First Amendment challenge to a "proscription against misrepresentations by labor organizations in the course of appeals to consumers," by commenting:

> **"[W]e should not be understood as declaring that the section and its criminal sanction would be unconstitutional if they proscribed damaging falsehoods perpetrated unknowingly or without recklessness. We have not adjudicated the role of the First Amendment in suits by private parties against nonmedia defendants. . . ."** (*Babbitt* at 309, fn. 16.)

The *Babbitt* court, therefore, apparently considered the question to be an open one.

The foregoing authorities (and many others) call into serious question, the modern precedential value of the centuries-old law on which Petitioners rely.

C. The Injunction Does Not Unduly Burden The Court

With remarkably little authority, Petitioners argue that:

> **"Injunctions have not been, and should not be permitted in defamation cases [because] . . . [a]ny *effective* injunction will be overbroad and any *limited* injunction will be ineffective."** (MB 26 (emphasis in original).)

In their attempts to support this statement, Petitioners have again improperly used the terms "[p]rior restraints" and "injunctions" interchangeably, which renders the already thin analysis in their Brief on the Merits even less persuasive.

It appears, however, that the theory being advanced by Petitioners is that Cochran has no **right** to enjoin future conduct, and no **reason** to enjoin past conduct. If this were the law, then the remedy of injunctive relief would effectively be rendered nugatory.

Petitioners' hypothesis also ignores the fact that the evil Cochran seeks to avoid is the wrongful extortionist **conduct** which Petitioners are almost certain to resume if the existing Injunction is narrowed. The only way this wrong can effectively be remedied is by proscribing **all** discussion about Cochran by Petitioners in the public forum, while allowing them the freedom to make **any** statements about Cochran outside of the public forum. Thus, the bounds of the existing

Injunction are both "precise and clear," as required by *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), and neither the Court, nor Cochran, nor anyone else, will be required to "censor" Petitioners' speech, or to evaluate its content.

Further, this is not a case like *Southeastern Promotions, Ltd., supra*, where:

> **"Respondents did not permit the show to go on and rely on law enforcement authorities to prosecute for anything illegal that occurred. Rather, they denied [an] application [for a license to present live theatre] in anticipation that the production would violate the law."** (*Id.*)

Here, Cochran did "permit the show to go on," so to speak, and something "illegal" did occur. Cochran then "prosecute[d]" to conclusion, his resulting claims against Tory. After prevailing in that action, Cochran was awarded relief in the form of liberation from Tory's harassing, distracting and coercive behavior. To now deprive Cochran of the hard won fruits of his protracted legal battle with Tory would be the ultimate injustice.

Finally, as discussed under heading V below, the Injunction here at issue is **already** drawn as narrowly as possible to achieve the (admittedly conflicting) objectives of recognizing and protecting the rights and interests of Cochran, the government and the public, on one hand, and impinging on Petitioners' expression rights as little as possible, on the other.

V. THE INJUNCTION IS NOT CONSTITUTIONALLY OVERBROAD

Petitioners' final challenge is that the Injunction is constitutionally overbroad. It is content neutral, however, and it does not unnecessarily burden speech rights. Accordingly, it survives the "overbreadth" challenge.

In *Ward v. Rock Against Racism*, *supra*, the Supreme Court reaffirmed the circumstances under which a **statute** regulating the "time, place and manner" of expression is overbroad:

> **"[A] regulation of the time, place, or manner of protected speech must be narrowly tailored[23] to serve the government's legitimate, content-neutral interests but ... it need not be the least restrictive or least intrusive means of doing so."** (*Id.* at 798 (footnote added).)

In *Madsen*, it was explained that the First Amendment overbreadth challenges to an **injunction** (as opposed to a statute or ordinance) called for a different test. The *Madsen* court held that the First Amendment requires that the challenged provisions of the injunction must, in addition to being content-neutral, "burden no more speech

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[23] "[T]he requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.'" (*Id.* at 799, citing *United States v. Albertini*, 472 U.S. 675, 689 (1985).) The regulation may not, however, "burden substantially more speech than is necessary to further the government's legitimate interests," nor may it affect expression "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." (*Id.*)

than necessary to serve a significant governmental interest." (*Madsen*, *supra*, at 765.)

The Injunction here at issue must therefore satisfy the heightened *Madsen* standard in order to survive constitutional scrutiny. This is easily accomplished.

A. The Injunction Is Content-Neutral Because It Is Designed To Restrain Petitioners' Wrongful Conduct, Not To Suppress Any Specific Communications

In order to determine whether a statute, injunction, or the like is "content-neutral" for purposes of determining whether one of the above-referenced tests may be applied, "threshold consideration" is the "purpose" behind the regulation at issue. (*Madsen* at 763.) Thus, for example, in *Ward*, *supra*, a municipal ordinance requiring musicians performing in a city bandshell to use the City's amplification system, was found to be content-neutral because it "was not adopted because of any disagreement with the message conveyed by the music, but only because the City was attempting to control the volume of sound emanating from the bandshell." (*Ward*, *supra*, at 798, fn. 6; *see also*, *O'Brien v. United States*, 391 U.S. 367 (1968) [the "administrative" nature of a law forbidding the destruction of draft cards kept it from being content-based].)

Similarly, in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a municipal zoning ordinance that prohibited an "adult" movie theatre from locating "within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school" was held "content neutral." Despite the disparate treatment afforded different types of theatres, the District Court found that the

City Council's "*predominate* concerns" in adopting the ordinance were with the secondary effects of adult theaters – such as crime, reduced property values, and a lower quality of life – and not with the content of adult films themselves. (*Id.* at 47 (emphasis in original).) That intent, held the Supreme Court, was "more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." (*Id.*)

In determining content neutrality, courts have also asked whether the government has adopted a regulation of speech "without reference to the content of the regulated speech." (*Madsen* at 763, citing *Ward*, *supra*, 491 U.S. at 791; *see also*, *R.A.V.*, *supra*, 505 U.S. at 386 ["The government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed"].) This standard was applied in the anti-abortion protest cases of *Madsen*, *supra*, and *Schenck*, *supra*. In both cases, it was held that the injunctions limiting various aspects of the protests were "content-neutral" because they were issued, "not because of the content of [the protesters'] expression, . . . but because of their prior unlawful conduct" (*Schenck*, *supra*, at 374, fn. 6, citing *Madsen*, *supra*, 512 U.S. at 764, n. 2.) Like *Renton*, the *Madsen* decision held that the fact that the **effect** of the injunctions was to suppress a particular type of expression did not change the content-neutral character of the expression at issue:

> **"That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share the same opinion regarding abortions being performed at**

> **the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."** (*Madsen* at 763 (emphasis in original).)

When the above-described standards are applied to the facts at bar, it is inescapable that the Injunction, like the orders in *Madsen* and *Schenck*, and like the ordinance in *Renton*, is "content-neutral" for purposes of analyzing its constitutionality. As even Petitioners acknowledge in the first paragraph of their "Statement of the Case," the Injunction here at issue "prohibits . . . *all* future speech in any public forum – regardless of content or context." (MB 2.) Petitioners would be hard pressed, therefore, to argue that the content of their "message" is being regulated. Petitioners are as much in violation of the Injunction if they publicly praise Cochran as if they publicly criticize him.[24] That is the essence of neutrality.

Finally, although it addressed the constitutionality of a statute rather than an injunction, the case of *Virginia v. Black*, 538 U.S. 343 (2003) is worthy of note. *Virginia* held:

> **"The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate. . . . Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ."**

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[24] While only negative statements are typically consistent with extortion, Tory could just as easily demand unearned payments from Cochran in exchange for publicly making **positive** comments about Cochran.

Likewise, without running afoul of the First Amendment, the Los Angeles Superior Court "may choose to regulate," through the Injunction, picketing and related activity that it has found is being engaged in "with the intent to" attempt to extort money.

B. The Government Has A Significant Interest In Protecting Citizens' Rights To Earn A Living, Run A Business, And Generally, To Be "Left Alone"

Although the lawsuit that gave rise to the Injunction was filed to enforce Cochran's personal rights, the Injunction also serves "a number of governmental interests." (*Schenck, supra*, at 374.) Most significantly, the government has an interest in "protecting the property rights of all its citizens." (*Madsen* at 768.)

Cochran's right to run his business and practice a profession unquestionably "is . . . a protected property right." (*Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 413 (2003).) As part of this property right, Cochran has the right to make business decisions and to solicit business free from wrongful coercion." (*Id.* at 415, fn. 1 (Stevens dissent); *see also, United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978) [right to make business decisions free from outside pressure wrongfully imposed].) Tory, through his conduct and that of his agent, unlawfully interfered with **at least** the right to "solicit" business, if not actual income from new business that would have come in had Tory and his "hired guns" not

made it so difficult.[25] The Injunction obviously furthers this interest, as well as the "compelling interest" the state has "in the practice of professions within their boundaries . . . as part of their power to protect the public health, safety, and other valid interests." (*Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992), citing *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *see also Ferguson v. Skrupa,* 372 U.S. 726, 731 (1963); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).)

"[T]he prevention of fraud, the prevention of crime, and the protection of privacy" are three additional important "governmental interests" that have been recognized when weighing the constitutionality of government action against challenges from citizens (*Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 176-177 (2002)), as is "prevention of the erosion of confidence in the [legal] profession." (*Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).) Other significant governmental interests recognized by the Supreme Court in *Schenck* include: "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights . . ." and the right to be "left alone." (*Schenck*, *supra*, at 372.) All of these interests are implicated by the Injunction.

In light of the foregoing, it cannot be argued (and significantly, Petitioners do not argue) that the Injunction does not further a myriad of governmental interests.

[25] Assuming *arguendo* that Cochran did not actually lose any business (that he knows of), it is still impossible to know what would have happened, had Tory acted differently.

C. Under The Facts Of This Case, The Least Burdensome Way For The Government To Protect Cochran From Ongoing Extortion Is To Prohibit Tory From Speaking About Cochran In Any Public Forum

The courts are consistently "called upon to reconcile the right of the Nation and the States to maintain a decent society" with "the right of individuals to express themselves freely." (*Jacobellis v. Ohio*, 318 U.S. 184, 199 (1964) (dissenting opinion).) Here, the tension is between, on one hand, the interest of Cochran and the government to curtail Tory's demands for an undeserved payment "in tribute for" ceasing his public campaign of disparagement, harassment, and business interruption and, on the other hand, Tory's right to continue to make public statements about Cochran after demonstrating his desire to maliciously make false and offensive statements about Cochran for the improper purpose of attempting to extort money.

By prohibiting Tory from "orally uttering statements about Cochran and Cochran's law firm" in a "public forum," the Injunction achieves a balance between these two countervailing considerations. Tory has not been completely deprived of his freedom of expression; he remains free to make comments about Cochran to his heart's content, so long as he does not do so in a public forum. Yet Cochran is reasonably assured that he will not be subjected to further extortion attempts by Tory, since Tory needs a public forum to create the type of "negatively charged and ominous environment" that Cochran might be willing to pay to get rid of.

VI. COCHRAN'S PUBLIC FIGURE STATUS DOES NOT DEPRIVE HIM OF HIS RIGHT TO BE FREE FROM EXTORTION, NOR DOES IT DIVEST HIM OF INJUNCTIVE RELIEF AS A REMEDY

Cochran has conceded his public figure status. (JA 42.) Petitioners nevertheless inexplicably belabor the point (at pages 11 and 12 of their Brief on the Merits). It is obvious that Tory is hoping that the Court will infer that, because Cochran is a public figure, anything Tory has to say about Cochran is of public interest. One need look no further than the Statement of Decision, however, to see that nothing could be further from the truth. Tory's comments about Cochran were either lies (as confirmed by the trial court), such as "Johnnie Cochran is a crook, liar and a thief," or they are bizarre meaningless statements, such as "Your Piss Is Not Rain." Regardless of how important Cochran may be in the public eye, the speech Tory used in his attempts to extort money from Cochran remains completely valueless. Moreover, the trial court found the existence of malice. (JA 42-43.)

VII. IN THE EVENT THAT THE INJUNCTION IS HELD NOT TO COMPORT WITH CONSTITUTIONAL DICTATES, THE MOST DRASTIC REMEDY THAT THIS COURT SHOULD IMPOSE IS A MODIFICATION OF THE INJUNCTION

The courts, at both the state and the federal level, are imbued with the power to modify an injunction in order to ensure that injunction both complies with the law and continues to accomplish its intended result. (*United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968); *Union Interchange, Inc. v. Savage*, 52 Cal.2d 601, 604 (1959).) Generally, a court exercises the same power over its injunctive orders

which it, as a court of equity, exercises over its other orders or decrees. (*H. G. Fenton Material Co. v. Challet*, 49 Cal.App.2d 410 (1942).) Thus, a court of equitable jurisdiction has the intrinsic or inherent power to dissolve, vacate, or modify its injunctions. (*Transportation, Inc. v. Mayflower Services, Inc.*, 769 F.2d 952 (4th Cir. 1985).) Indeed, a court's continuing power to modify a permanent injunction is an exception to the general final judgment rule. (Am.Jur.2d *Constitutional Law* § 302, citing *Wolfe v. Tuthill Corp., Full-Rite Div.*, 532 N.E.2d 1 (Ind. 1988).) Accordingly, if, notwithstanding the arguments made herein, the Court determines that any aspect of the Injunction is unconstitutional, the proper response is to modify the order as necessary.

CONCLUSION

This is not a case about stifling speech relating to "malfeasance of public officers" or any other matter with any redeeming social value as Petitioners contend. (MB 30.) It is about stopping an individual and his "hired guns" from parading around with signs that say such things as "Hey Johnnie How Much Did They Pay You To F_ _ k Me?" and "Johnnie Cochran, Esq., Your Piss Is Not Rain," in furtherance of a deliberate scheme to extort money by "creating" such a "negatively charged and ominous environment" (JA 53-54) that Cochran would pay Tory to stop.

Even Petitioners acknowledge that speech may constitutionally be enjoined in "exceptional circumstances." (MB 30.) Although there is no bright line rule for what constitutes such "exceptional circumstances," a common thread running through the cases where they are

found is that speech may be restricted where an individual's right to express himself or herself is outweighed by the potential for harm that could result from the expression. The question before the Court is whether, when this balancing test is performed, the result is that Cochran's plight is such an "exceptional circumstance." Cochran submits that it is.

Although there is no precedent for a wholesale proscription of speech about a specific person in the public forum, there is also no decision of this Court that holds that such a remedy could never be appropriate. Here, if the Court engages in the "particularized analysis" required by *Kingsley*, *supra*, the need for the Injunction (or an appropriately modified version of the Injunction) becomes apparent as does the constitutionality of the order here at issue.

Respectfully submitted,

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